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Sexual Stereotyping in Partnership Decisions: The Second Stage

Hopkins v. Price Waterhouse Reaches the Supreme Court

By Martha S. Weisel

Introduction

At first glance, gender bias and the professional woman in accounting seems to be a contradiction in terminology. Although there is a long history of discrimination against the women "pioneers" entering the profession [Ried, Acken and Jancura, 1987, p. 339], the barriers to entry have eroded. In the last fifteen years, women have entered into the accounting profession at an unprecedented rate. More than 50% of the women who are CPAs have received their professional accreditation since 1980 [Stillablower, 1985, p. 22]. Today 50% of the new accountants being hired are women [Heaney, 1988, p. 8]. Women accountants are no longer seen

as a rarity, and major accounting firms routinely hire women into entry level positions where the entry level salaries equal those of their male co-workers [Olson and Frieze, 1986, p. 28].

Although women have entered the professions, certain barriers remain.

Partnership status has been particularly elusive for women in accounting.

Women represented 3% of the partners in the Big 8 public accounting firms in 1986, as compared to 1% in 1983, a small increase in light of the growth in the number of women actually in the field [Hooks and Cheramy, 1988, p. 20].



In 1984, the United States Supreme Court made its first decision relating to partnership decision-making. In *Hishon v. King and Spaulding*, [104 S.Ct. 2229, 1984], the highest court determined that professional partnerships fall under Title VII of the Civil Rights Act of 1964 and that partnership decisions should be evaluated under the employment discrimination law; that is, partnerships may not discriminate on the basis of sex in choosing partners.

The purpose of this article is to examine the court's most recent decision involving professional partnerships, *Hopkins v. Price Waterhouse*, [57 U.S.L.W. 4469, 1989]. It is a case involving important issues relating to gender bias, stereotyping on the basis of gender, and a professional woman's access into the upper ranks. *Hopkins* is the first case dealing with the methodology used by a partnership in making partnership decisions. The article has several objectives including (1) the development of the factual background of *Hopkins v. Price Waterhouse* and an explanation of the decisions of the lower courts; (2) an analysis of the decision of the United States Supreme Court; and (3) an examination of the meaning of the decision to the profession in general and in particular to women accountants who are on a partnership track.

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Background

Ann Hopkins was a senior manager at Price Waterhouse, a Big 8 accounting firm. At the time that she was proposed for partnership, she had worked at the firm's Office of Government Services [OGS] in Washington, D.C., for five years. She became a candidate for partnership when the partners in her local office submitted her name as a candidate. Of the 88 people suggested for partnership status in 1982, Hopkins was the only woman considered [825 F.2d at 462].

After being nominated by her division, Price Waterhouse circulated her name together with an appraisal from OGS to all partners. Partners submitted detailed evaluations of the candidate if they were familiar with Ms. Hopkins, while those who did not know her well submitted brief evaluations. The evaluations indicated that Hopkins had a number of strengths and weaknesses. Clients appeared pleased with Hopkins' professional performance. Staff members indicated that "she was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked" [618 F.2d at 1112]. However, her relationships with staff members were troublesome, with both supporters and detractors noting "she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff" [618 F.2d at 1113].

Many of the negative comments concerning Hopkins had a sexual

overtone. Critics suggested that she needed a "course in charm school" [825 F.2d at 463]. Even her supporters reacted negatively to Ann Hopkins' personality because of her gender, noting that "she may have overcompensated for being a woman" and that her use of profanity, though no worse than many of the men, was offensive "because she is a lady using foul language" [825 F.2d at 463].

The concerns of the Price Waterhouse partners led to the candidacy of Hopkins, along with that of 19 male candidates, being put on hold. Hopkins' major supporter, after the initial decision to hold her back one year, advised her "to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry" [618 F.2d 1117]. All of the men put on hold were renominated the following year and 15 of the 19 became partners [825 F.2d 462]. Hopkins' division did not renominate her. At that point, knowing that it was highly unlikely that she would become a partner, Hopkins resigned. Before resigning, she discussed the matter with one of the firm's partners who agreed with her decision.

The Lower Courts

Ann Hopkins brought her case to federal district court, arguing that

Hopkins is the first case dealing with the methodology used by a partnership in making partnership decisions.

Price Waterhouse had discriminated against her on the basis of her sex. She argued that she was qualified to be a partner, that she was not selected, and that Price Waterhouse continued to seek partners with her qualifications [618 F.2d 1113]. Under Title VII of the Civil Rights Act of 1964, a plaintiff who meets these criteria establishes a *prima facie* case of employment discrimination on the basis of sex. Once that is established, it is up to the defendant to establish that the firm's decision regarding the plaintiff was not based on impermissible sexual factors.

Price Waterhouse maintained that it was Hopkins' interpersonal skills, not gender discrimination, which negated her partnership chances. The district court noted that questions relating to interpersonal skills were a legitimate concern and that Hopkins' style "provided ample justification for the complaints that formed the basis of the Policy Board's decision (to put her on hold)," [618 F.Supp. at 1114]. Further, the decision by her office

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not to renominate her was, according to the district court, related to concerns about her interpersonal skills rather than any sexual discrimination [618 F.Supp. at 1114].

However, the district court distinguished between Hopkins' interpersonal skills and the sexual overtones of many of the comments.



Ann Hopkins

*Photo Credit:
Cynthia Johnson/Time Magazine*

The court noted that other women had been evaluated using sex-based criteria, in that "[c]andidates were viewed favorably if partners believed they maintained their femininity while becoming effective professional managers"; but "[t]o be identified as a women's libber was regarded as a negative comment" [618 F.Supp. at 1117]. The evidence indicated that Price Waterhouse gave a great deal of weight to the negative comments although "those comments reflected unconscious sexual stereotyping by male evaluators based on outmoded attitudes towards women" [825 F.Supp. 1118-9].

The district court which heard the testimony determined that these comments were part and parcel of the regular partnership evaluation, that the firm did not discourage such comments, did not address the need to revise such thinking, and in fact did not take any action at all [825 F.Supp. at 1119].

The district court acknowledged that such thinking could not be quantified. However, it found that

although her interpersonal skills were a legitimate subject of concern, any analysis of her interpersonal skills was tainted by Price Waterhouse's failure to deal with sexism in its evaluation scheme.

The lower court's decision highlights the two key issues presented in *Hopkins* that were eventually decided by the United States Supreme Court. The evaluation process was deemed to be tainted and this produced what is called a "mixed motive" issue. In a mixed motive case, the employer uses legitimate business concerns in making an employment decision. However, those legitimate concerns are combined with the use of impermissible sexual discrimination. According to the district court, in *Hopkins* there was the impermissible sex stereotyping. However, there was also the legitimate business concerns concerning Hopkins' lack of interpersonal skills. In such a scenario, where the plaintiff (Hopkins) has established that impermissible factors (sexual stereotyping) played a significant

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role in denying her a partnership position, the burden shifts to the defendant (Price Waterhouse) to establish that the decision would have been the same anyway.

For Price Waterhouse to meet its burden, the district court required that the accounting partnership prove that its decision would have been the same through clear and

convincing evidence. It should be noted that the District Court had determined that Hopkins had already completed the initial *prima facie* case, that is, that she was qualified for the position, that she was not chosen for the position, and that Price Waterhouse continued to look for other partners. At this juncture, the burden switches to the defendant.

The normal burden of proof required for civil cases is preponderance of evidence, meaning that the defendant convinces the trier of facts that the defendant's position is more believable or more likely to have occurred. The District Court determined that Price Waterhouse had not met this requirement, and found in favor of Hopkins.

The Circuit Court of Appeals affirmed the lower court's decision to shift the burden from Hopkins to Price Waterhouse once Hopkins had established her *prima facie* case because the facts of *Hopkins* involved mixed motives, one that included Hopkins' "apparent lack of interpersonal skills" as well as the "sexually biased evaluations" [825 F.2d at 471]. The appellate court agreed that Price Waterhouse would have to prove that its decision was **not** based on the impermissibly biased evaluations by clear and convincing evidence, a burden that Price Waterhouse did not meet.

United States Supreme Court Looks At Sexual Stereotyping and Burden of Proof

On May 1, 1989, the United States Supreme Court handed down its decision in *Hopkins* [57 USLW 4469]. The justices looked at three primary issues including, (1) what is sexual stereotyping and whether it is legally relevant, (2) the type

of evidence that must be offered by an employer in a mixed motive case once an employee has established sexual stereotyping, and (3) level of proof required of an employer in a mixed motive employment discrimination case.

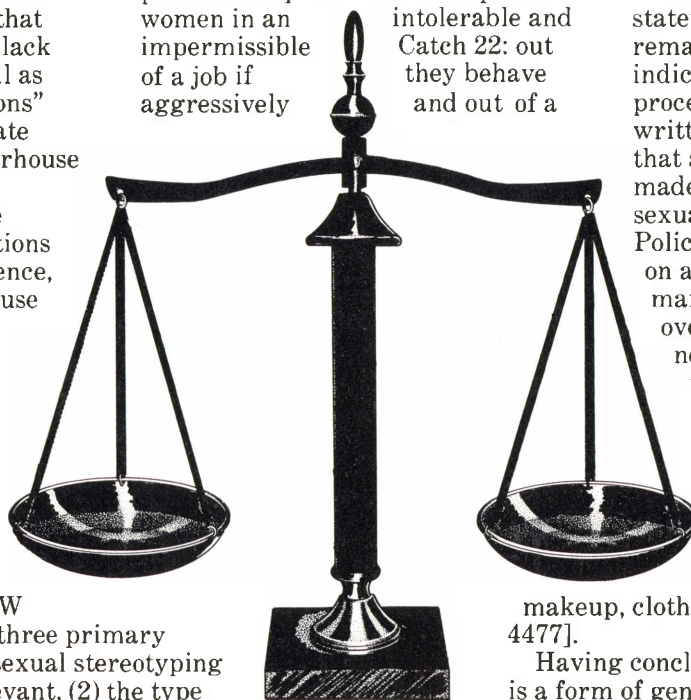
A threshold issue in *Hopkins* was whether sexual stereotyping is in fact discrimination in employment decisions. Although Price Waterhouse did not specifically argue this point, the court noted that by putting the phrase in quotation marks "throughout its brief seems to us [the Court] an insinuation that either such stereotyping was not present in this case or that it lacks legal relevance" [57 USLW at 4475]. The Court rejected both hypotheses, finding that forbidding an employer from stereotyping an individual based on her gender is just what Congress had in mind in passing Title VII. "An employer who objects to aggressiveness in women but whose positions require this trait places women in an impermissible Catch 22: out of a job if aggressively intolerable and they behave and out of a

job if they don't. Title VII lifts women out of this bind" [57 USLW at 4476]. An employer who acts on the basis of a belief that a woman cannot be aggressive or that she must not be has impermissibly used sexual stereotypes in reaching an employment decision [57 USLW at 4475].

The court noted that it is not the remarks themselves which are considered sexual stereotyping but whether the remarks played a part in the employer's decision [57 USLW at 4476]. Sexual stereotyping must be a motivating factor used by the employer in making its decision. To determine this, the Supreme Court suggested that a question be asked. "If we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman" [57 USLW at 4475].

In *Hopkins*, the partners' statements went beyond mere remarks. The evidence presented indicated that the partnership process required partners to make written comments on candidates, that a number of the comments made about Hopkins were based on sexual stereotypes and that the Policy Board's decision was based on assessing these evaluations, many of which had sex-based overtones [Id. at 4476]. The court noted that it took "no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school' or in Hopkins' major supporter's advice, that she could correct her 'interpersonal skills' through makeup, clothing and jewelry" [57 USLW at 4477].

Having concluded that sexual stereotyping is a form of gender-based discrimination that



is legally relevant, the Supreme Court accepted the District Court's conclusion that the comments of the Price Waterhouse partners in evaluating Hopkins showed just such impermissible stereotyping [Id. at 4475]. The fact that a number of the comments were made by supporters rather than opponents did not change the court's decision.

The fact that Hopkins met that threshold requirement, showing a *prima facie* case of employment discrimination on the basis of sex, did not end the inquiry. The Supreme Court acknowledged that there were other factors present as well, namely Hopkins' inadequate "interpersonal skills." However, the interplay between impermissible sexual stereotyping and Hopkins' poor interpersonal skills is just what makes this a mixed motive type employment discrimination case.

The Supreme Court began its analysis of *Hopkins* by going to the source, Title VII, stating that:

"[i]n passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers MAY take into account in making employment decisions," [57 USLW at 4472].

Hopkins argued that Price Waterhouse's decision not to make her a partner was based on her gender. She argued that once an employee establishes that her gender played a part in an employer's decision, which she had done, the employer may not avoid liability under Title VII. In

contrast, Price Waterhouse argued that an employer is liable under Title VII only if the employer's decision "gives decisive consideration to an employee's gender . . . in making a decision that affects that employee" [Id. at 4472]. Price Waterhouse argued that it is up to the employee to establish **not** just that gender figured into the employer's decision-making process, but that the employer's decision would have been different if gender had not been considered. The Supreme Court concluded that both sides' views were somewhat distorted.

Price Waterhouse argued that Title VII meant that the plaintiff must establish that the partnership's decision would have been different "but-for" the use of gender in making the decision. The Supreme Court disagreed, holding that "[t]he critical inquiry . . . is whether gender was a factor in the employment decision AT THE MOMENT IT WAS MADE" [57 USLW at 4473]. Further, the court noted that gender had only to be one factor that was considered by the partnership in making its decision, not that it had to be the only factor considered in making its decision.

The Supreme Court noted that "while an employer may not take gender into account in making an employment decision, . . . it is free to decide against a woman for other reasons" [Id. at 4473]. Here, Hopkins established that the partnership decision-making process was tainted by the evaluations which used stereotypical concepts of women against her candidacy, an impermissible concern. However, the lower court also found that there were legitimate concerns about Hopkins' inability to relate to lower-level employees.

Where an employer has mixed motives in making its decision, the Supreme Court concluded that the employer must carry the burden of justifying its ultimate decision [57 USLW at 4475]. The court refused to require a woman who has established that gender played a role in an employment decision to also establish that the decision would have been different had gender not been considered. That is an obligation that falls on employers. The employee has the *prima facie* responsibility of establishing that gender was a motivating factor in making an employment decision, which Hopkins met. Having done so, the burden shifts to the employer to establish that the decision would have been the same even if gender had not been considered. The Supreme Court rejected Hopkins' contention that once she established that sexual stereotyping was used in the partnership decision-making process, Price Waterhouse was liable under Title VII.

The Supreme Court rejected the lower court's decision to require Price Waterhouse to prove that its decision would have been the same absent any gender-based evaluations by clear and convincing evidence. The highest court determined that such a requirement was not necessary in this type of employment discrimination case. Just what does Price Waterhouse have to establish to show that its decision not to make Hopkins a partner would be the same even if no gender-based information were used? The Supreme Court determined that the employer need only prove his position through a preponderance of evidence, the evidentiary standard which is normally used for civil cases. Therefore, the

(continued on page 9)

Supreme Court remanded the case so that Price Waterhouse has the opportunity to prove by a preponderance of evidence that its decision would have been the same even if the tainted evaluations were not used.

Conclusion

In 1984, the United States Supreme Court brought partnership decision-making under the ambit of Title VII of the Civil Rights Act of 1964. The highest court's most recent decision, *Hopkins v. Price Waterhouse*, articulates some of the standards by which partnership decisions will be reviewed by a court. As such, the court's opinion in *Hopkins* may be viewed as a primer for partnership candidates and their employers. It is a mixed decision. Women on partnership track can look to the court's decision and see both positives and negatives. That is also true for the professional partnerships.

At the outset, women considering employment discrimination challenges because a partnership has failed to make them partners must be able to develop a strong *prima facie* case. This must include sufficient documentation that the woman was qualified for the position of partner, that she was not selected for partner, and that the partnership continued to look for other partners after her candidacy was denied. Ann Hopkins was able to develop that type of record. Her resume was very strong, both in recommendations from her colleagues in her division and from her clients, and in her ability to help generate business for the firm. This is a first step in any employment discrimination case involving a woman who believes that she was wrongfully denied a partnership position.

Once a woman has successfully

met this initial hurdle that gender played a part in the employer's decision not to make the woman a partner, the burden shifts to the employer. The Supreme Court's decision in *Hopkins* makes it clear that although the employer may have decided not to make a woman a partner for reasons other than gender, and that such reasons are perfectly acceptable, once the woman establishes that gender played a role, the employer has the burden of showing that the decision was made for non-gender-based reasons. Therefore, in *Hopkins*, the burden is now on Price Waterhouse to establish through the testimony and other evidence that they

The Hopkins case sets a precedent for employment discrimination cases with mixed motives.

present that their decision was based on Hopkins' poor interpersonal skills and not on the sexual stereotyping that was revealed in the evaluations.

A most significant point is the court's decision to require that the employer meet its burden only by a preponderance of evidence rather than through clear and convincing evidence, the burden that was required by the lower courts. Clear and convincing evidence is an evidentiary burden which is much more difficult for an employer to establish. *Hopkins* determined that such a difficult burden is not required in these types of cases.

The *Hopkins* case sets a precedent for employment

discrimination cases with mixed motives. Sexual stereotyping is legally relevant to such cases. Once a woman develops a *prima facie* case that gender played a part in an employer's decision, the burden of proof shifts to the employer to prove with a preponderance of evidence that the decision would have been the same if gender had not been considered. Hopefully, the case will heighten the awareness that sexual stereotyping is discriminatory. A positive outcome the profession should strive for is to eliminate sexual stereotyping in all personnel decisions — not just partnership decisions.

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